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VIA HAND DELIVERY

March 24, 2003

<u>EX PARTE</u> RECEIVED

Marlene Dortch Secretary Federal Communications Commission 1he Portals TW-A325 445 12th Street, S **W** Washington, D C 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re Notice of Written Ex Parte Presentation CC Docket Nos 02-33, 98-10, 95-20, 01-337

Dear Ms. Dortch:

On March 24, 2003, the attached letter was delivered to Chairman Powell. The purpose of the letter is to explain the legal obstacles to using "regulatory parity" as **a** basis for decision in the *Wireline Broadband* proceeding.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, eight copies of this Notice are being provided to you for inclusion in the public record in the above-captioned proceedings. Should you have any questions, please contact me.

Kenneth R. Boley

Counsel for EarthLink, Inc.

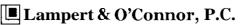
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March 24, 2003

Chairman Michael Powell Federal Communications Commission 445 12th Street, **S.W.** Washington, D.C 20554

Re Regulatory Parity and the *Wireline Broadhand* Proceeding

Ex Parte Presentation, CC Docket Nos 02-33, 98-10, 95-20, 01-337

Dear Chairman Powell

EarthLink submits this letter to explain the legal obstacles to using "regulatory parity" as a basis for decision in the *Wireline Broadband* proceeding. **As** discussed below, judicial and Commission precedent are clear achieving regulatory parity is not itself a valid legal basis for Commission action, including deregulation of Bell Operating Companies' ("BOC") advanced services. Simply put, the Commission risks reversible error in this proceeding if it eliminates Title II and *Computer Inquiry* safeguards on BOC services for the sake of the administrative (not statutory) goal of regulatory parity. Rather than seek to attain "parity," the Commission's decisions in this proceeding must rest squarely on whether a change to current access obligations achieves a net increase in consumer welfare

As an initial matter, all sides in this proceeding would agree the Commission should tailor its decisions to the mandates of the Communications Act. However, a review of the Act demonstrates that the FCC has no statutory authority to set regulatory parity as its goal in this proceeding or to elevate it above the express goals set forth therein ¹ Legislative history of the

The asserted "regulatory parity" objective in this proceeding on wireline broadband obligations would apparently only mean deregulation of the BOCs, *i.e.*, a reduction of access obligations for incumbent LECs would tend toward a parity of regulation vis-a-vis the lack of regulation on cable modern service *See, In the Muller of Appropriate Framework for Broadband Access to Internet over Wireline Facilities*, Notice of Proposed Rulemaking, CC Dkt. No. 02-33, FCC 02-42, ¶ 6 (rel Feb. 15, 2002) (FCC "will strive to develop an analytical framework that is consistent, to the extent possible, across multiple platforms")

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Telecommunications Act of 1996 (" 1996 Act") confirms this lack of statutory authority. In fact, the Senate version of the Act, as reported by the Senate Commerce Committee and as adopted by the Senate, contained a Section 305 entitled "Regulatory Parity". Significantly, however, Congress ultimately decided to eliminate regulatory parity as a goal of the Act and rejected this portion of the legislation in the final bill approved by both houses of Congress and signed by then-President Clinton

Neither has Congress implicitly endorsed regulatory parity as a goal of the Communications Act. Indeed, the structure of the Act imposes distinct obligations on providers even where competitive overlaps may occur.³ In those few instances where Congress has set regulatory parity of competitors as a goal, it has done so explicitly and has imposed limits on the scope of decisions made for the sake of regulatory parity. Perhaps the best example is the enactment of Section 6002(d) of the 1993 OBRA (codified at footnote 1 of Section 332(c) of the Act) dealing with transitional regulation for mobile service providers, where Congress directed the FCC to establish "technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services." Even there, however, Congress never directed the FCC to eliminate competitive safeguards in wireless services for the sake of regulatory parity, and the Commission refused to elevate the specific language of § 332 above its statutory mandate to foster consumer welfare. As the Commission explained in McCaw AT&T⁵ where BOCs argued that AT&T/McCaw should be subject to the same MFJ restrictions as the BOCs

² S. 652, "Telecommunications Competition and Deregulation Act of 1995," § 305, as reported in S Rpt No 104-23. A copy of Section 305 is attached hereto.

³ Compare 47 U.S.C.§ 251(b) with § 251(c) (statute sets out additional regulatory requirements for incumbent LECs vis-a-vis competitive LECs), and § 153(26) (CMRS carriers are not to be regulated as "local exchange carriers" subject to Section 251(b) obligations absent FCC finding that they should be so treated); *Id.*, § 332(c)(8) (terrestrial and satellite mobile telephone carriers are not required *to* provide unblocked access *to* long-distance carriers unless the FCC determines that such a requirement would be in the public interest).

⁴ 47 U S C § 332(c) n 1 citing § 6002(d)(3)(B) of the Omnibus Budget Reconciliation Act of

⁵ In re Applications of Craig O. McCaw and AT&T, Memorandum Opinion and Order, 9 FCC Rcd. 5836 (1994), aff'd, SBC v. FCC, 56 F.3d 1484 (D.C.Cir. 1995).

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"we reject the proposal, and all others made by the BOCs, of parity for parity's sake the Communications Act does not require parity between competitors as a general principle."⁶

On reconsideration, while the BOCs relied upon the Section 332 regulatory parity language "to treat all cellular carriers uniformly," the FCC held that

"[d]espite joint petitioners' claims about regulatory parity, the Communications Act requires us to focus on competition that benefits the public interest, not on equalizing competition among competitors.'"

As for the BOCs' Section 332 interpretation, the FCC pointed out that "Congress did not seek regulatory parity among different CMRS providers for parity's sake alone." Thus, no matter how strenuously the BOCs repeat the point, elimination of competitive safeguards for the sake of regulatory parity is not an objective of the Communications Act and, thus, of the Commission, even where Congress expressly calls for regulatory parity on certain discrete matters

Courts agree with the FCC's consistent position that BOC arguments for deregulation in the name of regulatory parity among competitors are fundamentally inconsistent with the Communications Act. For example, the Sixth Circuit rejected BOC arguments challenging the FCC's decision to impose a separate subsidiary requirement for BOC-affiliated wireless carriers but not for other large wireless carriers, stating.

for anticompetitive purposes)

⁶ *Id.*, at 5858

⁷ Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd. 11786, 11792-93 (1995).

⁹ GTE Midwest v. FCC, 233 F 3d 341, 345 (6th Cir. 2000) (Court affirmed FCC decision to establish a separate subsidiary requirement for in-region incumbent LEC-affiliated commercial wireless carrier, finding that the FCC correctly based its decision on the BOCs' bottleneck control over wireline network and potential to engage in anticompetitive behavior despite the resulting lack of regulatory parity); *Melcher v. FCC* 134 F. 3d 1143, I 149 (D.C. Cir. 1998) (Court upheld FCC decision to forbid incumbent LECs from acquiring LMDS licenses, despite lack of regulatory parity, because the FCC had adequately explained concern that incumbents would use the licenses

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"[t]here is no specific indication that the Act sought to promote parity between AT&T and the Bell Companies If Congress had sought to preclude the Commission's ability to impose separate subsidiary requirements, it could have done so explicitly "10"

Since Congress chose not to pursue regulatory parity as a statutory goal of the Commission, reviewing courts will be skeptical, as they have been in the past, of FCC decisions that are effectively premised on an agency-established goal of regulatory parity. In the seminal case, *Hawaiian Telephone Co. v. FCC*, the D C Circuit made plain the hazards to the Commission of establishing regulatory parity as a goal for **decisionmaking**:

"Competition as a factor might have some relevance to the FCC decision, if competition had been shown to be of benefit to the public on the communications routes in question. Yet it is all too embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically with the object of equalizing competition among competitors. This is not the objective or role assigned by law to the Federal Communications Commission. As a result of focusing first on competitors, next on competition, and then on the public interest, the FCC . . . has not met its statutorily imposed duty" 11

To be consistent with *Hawaiian TelephoneCo.*, the Commission's inquiry in the *Wireline Broadband* proceeding should not be whether incumbent LECs and cable operators are subject to identical regulation – they are not – but, rather, whether retention, modification, or elimination of ISP access rights under the Commission's *Computer Inquiry* precedent would harm or advance the public interest

More than twenty years ago, the D C. Circuit explained in *Western Union Telegraph Co.* v FCC that, while an incumbent provider may "object strongly to the Commission's failure to equalize the regulatory burdens to which it and [a competitor] are subject"" and while the

¹⁰ GTE Midwest Inc. v. FCC, 233 F.3d at 347 Nor does an earlier appellate decision on this issue, Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752 (6th Cir. 1995), support a general agency obligation of regulatory parity, as the BOCs may argue. Rather, the Cincinnati Bell court remanded the FCC's disparate treatment towards BOCs because the agency had failed to provide a rational explanation for not eliminating the separate subsidiary obligation. On remand, the agency did provide a reasoned explanation on the record, and the Sixth Circuit in GTE Midwest then aflimed the FCC's decision.

¹¹ Hawaiian Telephone Co. v. FCC, 498 F 2d 771, 775-776 (D.C.Cir. 1974) (emphasis added). ¹² Western Union Telegraph Co. v. FCC, 665 F.2d 1112, 1118 (D.C. Cir. 1981)

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incumbent may argue that the FCC's actions demand "reversal . . . until regulatory parity is achieved,"" these arguments are "without merit." 14 As the court explained,

"[E]qualization of competition is not in itself a sufficient basis for Commission action. Instead, as the Commission recognized, it must evaluate that action in terms of the public benefits, as provided by *Hawaiian Telephone Co. v. FCC... The Commission was necessarily obliged to consider other interests, however, particularly ihe public's, and we cannot require their disregard for the sake of immediate regulatory parity" 15*

More recently, in *SBC Communications Inc. v. FCC*, the court reiterated that "[t]he Commission is not at liberty to subordinate the public interest to a desire to 'equaliz[e] competition among competitors." ¹⁶

The Communications Act charges the FCC with rulemaking authority not so that it may tinker with the market shares of cable versus incumbent LEC platforms, but rather so it may promulgate regulations that further the public interest. In EarthLink's view, the record of this proceeding demonstrates that the *Computer Inquiry* access obligations continue to serve a vital role for consumers. While it would be impracticable to repeat all the evidence here, the record shows that ISPs offer a variety of functionalities and services that consumers value, and that although the incumbent LECs' ISPs can participate fully in the market, they cannot possibly match the enormous variety of competing offerings, including price and customer service packages, available in the ISP marketplace today. Furthermore, the presence of cable does not significantly alter the public interest calculus because there are no access requirements on the vast majority of cable systems today. In other words, without the incumbent LEC's platform, consumers have limited or no choices among broadband ISP services and prices, and so the *Computer Inquiry* obligations hold as much public importance today as they did when the Commission repeatedly affirmed them over the past decades 17

 $^{^{13}}$ Id., at 1120

¹⁴ *Id.*, at 1121

¹⁵ Id., at 1122 (emphasis added).

¹⁶ SBC Communications Inc. v. FCC, 56 F 3d 1484, 1491 (D.C.Cir. 1995) (citing Hawaiian Telephone, 498 F.2d at 776).

¹⁷ In fact, just four years ago, the Commission again stressed the importance of these obligations. In the Matter of Computer III Further Remand Proceedings, Report and Order, I4 FCC Rcd. 4289, ¶ 11 (1999) ("We believe that, in today's telecommunications market, compliance with the Commission's CEI requirements remains conducive to the operation of a fair and competitive market for information services"); id, at ¶ 16 ("We disagree with SBC and BellSouth that CEI (footnote continued on next page)

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Finally, there is no legitimate concern in this proceeding that incumbent LECs have a constitutional claim to regulatory parity, as some BOCs have intimated. Disparate regulation does not raise equal protection or due process concerns unless the FCC's actions are arbitrary or fall to show a rational basis ¹⁸ Any heightened constitutional scrutiny would be unwarranted in this proceeding because BOCs are not a constitutionally "suspect class." The FCC's disparate regulatory treatment would be subject to the least restrictive, rational basis review." Similarly, no First Amendment issues arise, because Title II and the *Computer Inquiry* rules are content-neutral obligations directed at the BOCs' bottleneck control over common carrier access facilities and have no iinpact on the BOCs' information services, editorial controls, or speech. ²⁰ Indeed, these obligations are indistinguishable from other access obligations of common carriers promulgated by the Congress, the Commission, and the States and should face no special constitutional scrutiny.

(footnote continued from previous page)

and other safeguards are surrogates for competition, and because there are so many competitive ISPs, such surrogates are no longer needed. Based on these circumstances, we do not believe that our progress in implementing the 1996 Act has reduced the threat of discrimination sufficiently to warrant removal of any of these additional safeguards at this time.") recon., Order, 14 FCC Rcd 21628 (2001)

¹⁸ Cincinnati Hell v. FCC 69 F 3d 752, 765 (6th Cir 1995) (court declined to overturn FCC decision, finding a rational basis for disparate treatment of SMR and cellular providers).

¹⁹ BellSouth v. FCC, 162 F 3d 678, 691 (D.C. Cir. 1998) ("The differential treatment of the BOCs and non-BOCs is neither suggestive of punitive purpose nor particularly suspicious. Accordingly, we need only subject Section 271 to rational basis scrutiny." (Citation omitted)).

²⁰ Leathers v. Medlock, 499 U S 439, 449-450 (1991) (finding no precedential support for claim that First Amendment issue arises where the government engages in "intermedia and intramedia discrimination" where there is an "absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas").

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EarthLink looks forward to the opportunity to discuss these issues with you and to discuss further why the balance of public interest concerns weighs in favor of continuing the rules for consumer access to 1SPs via the incumbent LEC broadband networks. In accordance with the Commission's *ex parte* rules, an original and eight copies of this letter have been provided to the Coinmission Secretary for inclusion in the above-referenced dockets

Sincerely,

Mark J. O'Connor Kenneth R. Boley

Counsel for EarthLink, Inc.

CC Commissioner Kathleen Abernathy

Cornmissioner Michael Copps

Commissioner Kevin Martin

Commissioner Jonathan Adelstein

John Rogovin

Marsha MacBride

Christopher Libertelli

Matthew Brill

Jessica Rosenworcel

Jordan Goldstein

Daniel Gonzalez

Lisa Zaina

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S.652

Telecommunications Competition and Deregulation Act of 1995 (Reported in Senate)

SEC. 305. REGULATORY PARITY

Within 3 years after the date of enactment of this Act, and periodically thereafter, the Commission shall-

- (1) issue such modifications or terminations of the regulations applicable to persons offering telecommunications or information services under title II, III, or VI of the Communications Act of 1934 as are necessary to implement the changes in such Act made by this Act,
- (2) in the regulations that apply to integrated telecommunications service providers, take into account the unique and disparate histories associated with the development and relative market power of such providers, making such modifications and adjustments as are necessary in the regulation of such providers as are appropriate to enhance competition between such providers in light of that history; and
- (3) provide for periodic reconsideration of any modifications or terminations made to such regulations, with the goal of applying the same set of regulatory requirements to all integrated telecommunications service providers, regardless of which particular telecommunications or information service may have been each provider's original line of business